In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 262

RICHARD W. BURGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The court of appeals entered a judgment affirming petitioner's conviction on February 25, 1965. Although petitioner's motion for rehearing was filed out of time, the court treated it as a "suggestion for rehearing" and overruled it on April 17, 1965. In so doing, the court recalled its previously issued mandate and directed that it not be reissued pending the filing and disposition of a petition for certiorari "providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before May

17, 1965" (Pet. 13a). On May 11, 1965, petitioner applied to this Court for an extension of the time in which to file a petition for certiorari stating that, by the order of the court of appeals, "the petition for certiorari is due in this Court on May 17, 1965, and the stay of the mandate granted by that court is conditioned on the petition being filed on that day" (Pet. for Ext. 1). In response thereto, Mr. Justice Douglas, on May 14, extended the time for filing to June 16, 1965, "provided that the statutory time has not already expired." The petition was filed on June 16, 1965. In view of petitioner's failure either to file his petition within thirty days of the entry of judgment or to comply with the condition specified by the court of appeals, which was recognized by this Court's order of extension, it is questionable whether the petition is timely.

In any event, further review of this case is not warranted. Petitioner was convicted, after a jury trial in the United States District Court for the District of Alaska, of concealing and facilitating the transportation of heroin, in violation of 21 U.S.C. 174, and was sentenced to five years' imprisonment (R. 1, 54, 104).[1] The court of appeals first reversed petitioner's conviction, 333 F. 2d 210, but, on rehearing, the conviction was affirmed, 342 F. 2d 408 (Pet. 1a-35a).[2] Petition-

[1] "R." refers to volume one of the record filed with the petition. "Tr." refers to the transcript of the trial proceedings, filed with the petition as volumes two and three.

[2] The panel was composed of Circuit Judges Chambers and Jertberg and Judge Madden of the Court of Claims. In both decisions, all three judges were agreed that the search of

er attacks the validity of two searches: (1) of his automobile, which at the time was in the lawful custody of the Treasury Department after forfeiture under 49 U.S.C. 782, and (2) of the one bathroom in the residence of Miss Dolores Wright, with Miss Wright's consent but without the consent of petitioner, who, unknown to the searching officers, was Miss Wright's house guest at the time.

1. The evidence showed that on April 23, 1959, petitioner sold heroin to a government informant at 774 17th Street, Fairbanks, Alaska, and received in payment $400 in marked bills (Tr. 24-29, 134, 228). Petitioner then used his car to drive the informant, who still possessed the heroin, to a bar, where they were both arrested. After a search at the time of arrest, in which no marked bills were found (Tr. 32, 198-201, 219-220, 204), petitioner's automobile was impounded at police headquarters (Tr. 7). At the behest of a Treasury agent, the car was later moved to a storage yard where it was searched by the agent and State officers on April 30. In a hole in the right front fender, they found the $400 in marked bills previously furnished to the informant (Tr. 222, 228, 234-236). Petitioner's automobile was subsequently sold at auction, under 49 U.S.C. 782 [3] (Tr. 305).

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petitioner's automobile was legal. They differed over the search of Miss Wright's apartment. Judge Chambers originally concurred with Judge Jertberg in reversing the conviction, but on rehearing he agreed with Judge Madden that the conviction should be affirmed. He stated that his previous view was based on a misconception of this Court's precedents (Pet. 12a).

[3] "Any * * * vehicle * * * which has been or is being used in violation of any provision of section 781 of this title, or in,

Although the petition attacks the validity of the search of petitioner's automobile on April 30, this point was not preserved for review in the district court. Petitioner's pre-trial motion to suppress the marked bills was premised on an allegedly unlawful search of his car at a service station on the afternoon of April 23. As no evidence to support this allegation was brought forth during the hearing, the motion to suppress was denied (Tr. 13). During the trial there was evidence that petitioner's car was at the service station in question on that afternoon (Tr. 207, 278), but there was no evidence that any search was made at that time and place. Although petitioner's counsel first stated that he had no objection to the admission of the marked bills (Tr. 237), he later announced that he wished to rely on the same objection made in his pre-trial motion to suppress (Tr. 245). At no time during the trial did petitioner contend that the search made on April 30 was invalid.[4]

Even if the point had been preserved, petitioner's contention is without merit. The vehicle in question was forfeited by petitioner at the time of its use to transport illegal narcotics. *United States* v. *One 1951 Oldsmobile Sedan*, 129 F. Supp. 321 (E.D. Pa.).

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upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited * * *." There is no dispute that petitioner's car was used in violation of 49 U.S.C. 781.

[4] See the district court's Memorandum Opinion (Pet. 36a-44a), reviewing the twenty claimed errors put forth in petitioner's motion for acquittal or new trial. The point attempted to be raised here is conspicuously absent.

It was in the lawful custody of the United States at the time the marked bills were found (Pet. 10a-11a, 29a-30a). Under such circumstances, the admission of the bills into evidence was not erroneous. *United States* v. *Haith*, 297 F. 2d 65 (C.A. 4), certiorari denied, 369 U.S. 804.[5] Furthermore, the marked money was pertinent only to the charge of selling narcotics, of which petitioner was acquitted. Its admission, even if improper, obviously was not prejudicial.

2. The government's evidence relating to petitioner's second contention showed that Miss Dolores Wright, tenant of the premises at 774 17th Street, was suspected of complicity in the narcotics sale that took place there. She was arrested in the early evening of April 23, 1959, shortly after petitioner's arrest, and was interrogated at the federal building, beginning at about 9:45 p.m. (Tr. 88, 94, 102-104, 109-110). At about 10:00 p.m., she told the officers that they could search her house and take anything they wanted as she had nothing to hide (Tr. 90, 108, 113, 115). Upon searching the premises, the officers found

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[5] Nothing in *Preston* v. *United States*, 376 U.S. 364, relied on by petitioner (Pet. 9-12), requires a different result. The car searched in that case was not stolen, but belonged to one of the suspects. 376 U.S. at 365. Although the Court assumed that the police were justified in searching the car at the time they found it because they had probable cause to believe it stolen, a subsequent search without a warrant was not sustained where the car was not in fact stolen and was, at the time of the search, both presumptively and actually the property of the suspect. Here the car was definitely known to have carried illegal narcotics and was forfeited by petitioner prior to the search.

a glass bottle containing milk sugar, an item frequently used in the preparation of narcotics, which was later found to contain petitioner's fingerprint and which was introduced into evidence at his trial (Tr. 86-92, 180). Although the officers were not aware of it at the time of the search (Tr. 91, 113), petitioner was then Miss Wright's house guest, occupying one of the two bedrooms in her house and sharing with her the use of the other rooms, including the one bathroom (Tr. 97-98). The officers found the bottle of milk sugar at issue in the bathroom medicine cabinet.

The district court held the bottle admissible on the ground that Miss Wright had freely consented to the search of her residence (Tr. 128). It was then suggested by petitioner's counsel that a portion of the premises might be considered as under petitioner's control, but it was not indicated that the bathroom should be so considered (Tr. 129).

The opinion of Judge Jertberg, concurred in originally by Judge Chambers, was that the case was governed by *Jones* v. *United States*, 362 U.S. 257, which did not involve the question of the reasonableness of a search, but only that of standing. Petitioner abandons Judge Jertberg's approach and relies on *Stoner* v. *California*, 376 U.S. 483, in which a hotel clerk had permitted police to search a tenant's room. In neither case did the tenant of the premises consent to the search. The rule is settled that where, as here, persons share the right to the possession of premises, the consent of one is sufficient to authorize a valid search, resulting in evidence admissible against the other. *United States* v. *Sferas*, 210 F. 2d 69 (C.A.

7), certiorari denied, *sub nom. Skally et al.* v. *United States*, 347 U.S. 935; *Stein* v. *United States*, 166 F. 2d 851 (C.A. 9), certiorari denied, 334 U.S. 844. Petitioner's rights to the premises, whatever they may have been, were certainly not exclusive as to the place where the bottle was discovered. It was entirely reasonable for the officers, having received Miss Wright's consent, to search the only bathroom in the house and there seize a bottle which may well have belonged to her.

Petitioner argues that the bottle could not have been relevant evidence unless shown to have been his exclusive property, in which case only he could consent to its seizure. This is not so. Regardless of who owned the bottle, it was relevant evidence because it was found in the house where other evidence showed petitioner had sold narcotics to the informant and because it bore petitioner's fingerprint. That it was not his exclusive property goes only to the weight of the evidence.

There is no merit in the suggestion that Miss Wright could not properly consent to the search of her residence. Contrary to petitioner's understanding (Pet. 19), this Court has held that consent to a search may be given by a person under arrest. *United States* v. *Mitchell*, 322 U.S. 65, 69-70.

The further contention that the court of appeals applied an improper standard in weighing the testimony as to Miss Wright's consent is also without merit. By any standard, there was ample support for the district court's finding that Miss Wright had voluntarily consented to the search. The witnesses'

credibility was determinative of this issue,[6] and appellate review of findings as to credibility is necessarily restricted. The standard applied in the court below was the same used in every other circuit. We note that petitioner does "not challenge the appropriateness of the Court's acceptance of the trial court's evidentiary findings on this issue, i.e., its refusal to credit Miss Wright's denial that she had consented" (Pet. 19, n. 14). In light of this concession, little remains of his argument on this point.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1965.

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[6] Miss Wright's testimony that she did not consent until after the search was made followed rather persistent leading questioning by petitioner's counsel (Tr. 95, 98-99). On the whole, her testimony on this point was equivocal (Tr. 95-100).

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. The Marked Money Was Inadmissible

In response to the petition's claim that the marked money was inadmissible because the search of the petitioner's automobile a week after his arrest was illegal, the Government advances three arguments, of which only one is addressed to the merits. It relegates the controlling precedent, *Preston* v. *United States*, 376 U.S. 364 to a footnote and attempts to distinguish *Preston* on the ground that the automobile in that case turned out not to have been stolen. There is not the slightest suggestion in this Court's opinion that this circumstance, mentioned parenthetically in the

narration of facts (id. at 365) affected the reasoning or result (id. at pp. 367-8). Nor does the Government here vouchsafe any explanation of its relevance. We understand *Preston* to have held that the search of an automobile long after and far from an arrest is not incident to that arrest and is therefore not within the exception to the Fourth Amendment's requirement of a warrant for a search. The Court held in *Carroll* v. *United States,* 267 U.S. 132 that an automobile may be searched without a warrant under circumstances in which a house might not be because the automobile is readily moveable. When the automobile is in the custody of the police, however, there is no possible excuse for the failure to obtain a warrant. The suggestion in the Memorandum in Opposition that the search in this case can be justified on the ground that "the car was definitely known to have carried illegal narcotics and was forfeited by petitioner prior to the search" misses the whole point of the Fourth Amendment, which is that such judgments are to be made not by the police but by an impartial judicial officer. *Johnson* v. *United States,* 333 U.S. 10, 14; *United States* v. *Jeffers,* 342 U.S. 48-51; *United States* v. *Ventresca,* 380 U.S 102, 106-7.[1]

The government cites one District Court case, which stands for the proposition, not challenged in the petition, that 49 U.S.C. § 782 authorizes the forfeiture of

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[1] The claim that the police had "definite knowledge" (Opp. p. 5, n. 5) is not only irrelevant, it is inaccurate. The question whether the automobile had been used for carrying narcotics depended upon whether petitioner had sold the narcotics to the government informant. That issue in turn was raised by the second count of the indictment which after trial resulted in a divided jury. This confirms the premise of the Fourth Amendment that an impartial trier of fact will often disbelieve what the police "definitely know."

a vehicle which "facilitates" the illegal transportation of narcotics.[2] The only other authority cited, *U.S.* v. *Haith,* 297 F. 2d 65 (CA 4) *cert. denied,* 369 U.S. 804, is in accord with the decision below.[3] However neither the decision below, nor that in *Haith,* nor the Memorandum in Opposition attempt to resolve the paradox which underlies the Government's theory: when the Fourth Amendment prohibits unreasonable seizures as well as unreasonable searches without a warrant, how may the police seize without a warrant that which they could not constitutionally search, and then justify the search on the basis of that seizure? The theory rests at bottom on the claim that 49 U.S.C. § 782 supersedes the Fourth Amendment.[4]

The technical points raised in the petition are likewise unsound. It is first asserted that the petitioner

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[2] We reserve the right to argue if the case is here on the merits that 49 U.S.C. § 782 can be constitutionally applied to justify a seizure without a warrant only if the vehicle in question is seized at the time of the arrest, and also further that the constitutionality of the forfeiture is premised on the owner's opportunity for a hearing before it becomes final.

[3] In *Haith,* however, there was probable cause for the search, which was therefore lawful under *Carroll, supra,* as the Court of Appeals held. The Court was therefore not confronted with the question of whether 49 U.S.C. § 782 would authorize a search which would otherwise be forbidden by the Fourth Amendment, nor was that question raised in the petition for certiorari.

[4] It should be noted that 49 U.S.C. § 782 does not even purport to authorize the search here. There is nothing in its language which authorizes the government to search vehicles which are subject to forfeiture and the legislative history makes clear that this was not one of the purposes of the provision. Those purposes were to decrease the profits of narcotics violators, deprive them of vehicles which were "peculiarly adapted to" narcotics violations "and to make them available, without expense to the Government for use in the apprehension of law violators". H. Rep. No. 1034, 76th Cong., 1st Sess.

did not properly preserve the issue of the validity of the search of his automobile. (Opp. pp. 2-3). This argument is based on the fact that the motion to suppress assumed that the search had been made on April 23, rather than on April 30 as appeared at the trial. However, the precise legal issue is whether petitioner was convicted on the basis of evidence which had been illegally seized by the Government. He properly raised this issue by making a motion to suppress which need not even have been reiterated at the trial, *Cogen* v. *United States,* 278 U.S. 221, 223 and was sufficient to preserve the point unless expressly waived as in *Lawn* v. *United States,* 355 U.S. 339, 353-54. Cf. *Johnson* v. *Zerbst,* 304 U.S. 458, 464. If the Government's contention were accepted a defendant could be convicted on illegally obtained evidence unless the entire circumstances of the search are known to the defense at the time of the motion to suppress. Moreover, even if a defendant could be bound by the assumptions of his motion to suppress where there was prejudice to the Government, none can be shown here. The actual circumstances constituted a far more serious violation of petitioner's Fourth Amendment rights than he had assumed, since under *Preston* the additional week's delay after arrest aggravated the illegality of the search. Finally, while we believe that disposition of constitutional issues in criminal cases should not be based on the misstep of one party or the other in the course of the proceedings, it is noteworthy that the present technical objection was not raised by the Government in the Court of Appeals, which decided the legality of the search on the merits.

The Government's alternative technical argument is that the admission of the marked money in evidence

was not prejudicial. The test enunciated by this court for determining whether the admission of the illegally seized evidence is harmless error is whether there is "a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87. In this case there is not only a reasonable possibility, there is a substantial likelihood that the admission of the marked money aided in the petitioner's conviction. The Government's theory, though not spelled out, appears to be that since the jury acquitted petitioner on the sale count, it could not have treated the marked money as evidence against him. That argument fails first, because it is inaccurate in its factual premise: the jury did not acquit petitioner on the sale count but rather was unable to reach a unanimous verdict.[5] Thus, for aught that is known some members of the jury were influenced by this money to believe that petitioner had made the sale with which he was charged. Those jurors therefore would have been more likely to disbelieve his denial of both the sale and the possession and therefore have been more prone to convict him on the possession. Additionally, the marked money tended to corroborate the testimony of the government informant Hazel Geary whose credibility was critical to the government's case, and who was not inherently trustworthy. See Pet. p. 5, n. 2. This possibility was held

[5] Even if petitioner had been acquitted on the sale count, the Government's theory would rest on the assumption that the jury's actions on the two counts were consistent. This hypothesis, as the Government regularly and successfully has insisted, is unsound, and speculation over the reasons for a jury's actions on separate counts is impermissible. See, e.g. *Dunn* v. *United States*, 284 U.S. 390; *United States* v. *Dotterweich*, 320 U.S. 277, 279; *Hannon* v. *United States*, 340 F. 2d 145, 150 (CA9) cert. denied, 380 U.S. 977; *Koolish* v. *United States*, 340 F. 2d 513, 525-26 (CA8) cert. denied, 381 U.S. 951.

PETITIONER'S REPLY BRIEF

in *Stoner* v. *California,* 376 U.S. 483, 490 n. 8 to render the admission of illegally seized evidence reversible error. See also *Channel* v. *United States,* 285 F. 2d 217, 222 (CA 9).

II. The Glass Bottle Was Inadmissible

In seeking to sustain the admissibility of the glass bottle the government does not even attempt to discuss the controlling precedent, *Stoner* v. *California,* 376 U.S. 483. That case, we reiterate, unanimously held that a person may lose his constitutional protection against an unreasonable search only by his own consent or that of his agent. Neither court below found, and the government does not contend, that Miss Wright was acting as petitioner's agent when she consented to the search of the apartment at which he was a guest.[6] The claim that petitioner may object to the search only if his right to the premises is *exclusive* (Opp. p. 7) is contrary not only to *Jones* v. *U.S.,* 362 U.S. 257 but also to *Stoner* and the hotel cases which preceded it. Indeed, in both *Stoner* and *U.S.* v. *Jeffers,* 342 U.S. 48, 51 the Court expressly recognized that persons other than the occupant (whose right to be free from a warrantless search was sustained) will have access to a hotel room.[7] Thus, without more, *Stoner* requires reversal.

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[6] The Government's own statement of the facts demonstrates that Miss Wright was intent upon exonerating herself (Opp. p. 5), thereby negating any agency relationship.

[7] The two Court of Appeals decisions which are cited in the Opposition (p. 6) antedate *Stoner* and are therefore not authoritative. The results of those cases, however, may be sound, and can be reached by applying the *Stoner* analysis. Thus, in *Sferas,* one partner to the counterfeiting enterprise could be treated as the agent of the other partner with respect to a search of the business premises; likewise in *Stein* the wife could be considered the agent of her husband with respect to a search of their common domicile.

The Petition asserted that even if the search of the apartment had been justified by Miss Wright's consent, the seizure of the glass bottle was not justified since there was no claim that she consented to that action. Thus, the seizure was illegal unless "petitioner had *no* interest in the bottle". (Pet. p. 16, emphasis supplied). The government's sole attempt to rebut our position is to misstate it and to treat it as an argument on relevancy. (Opp. p. 7).[8] The tactic of erecting a strawman and combatting it implicitly concedes the merit of the contention actually raised.

With respect to the issue of voluntariness the Petition made two points:

(1) The Court of Appeals did not adequately review the District Court's determination of voluntariness because it affirmed that determination on the sole ground that it was not "clearly erroneous" (question 2(b) of the Petition); (2) the consent given under arrest was not voluntary (question 2(c) of the Petition). The Memorandum in Opposition, however, treats the petition as if it challenged the Court of Appeals' affirmance of the District Court's finding that Miss Wright had in fact consented (pp. 7-8). However, the Petition conceded that the consent was given, challenging only its voluntariness. That issue did not turn on Miss Wright's credibility, but is a mixed question of fact and law with constitutional overtones as to which the "clearly erroneous" test is plainly inappropriate. See *Baumgartner* v. *United States,* 322 U.S.

[8] The Petition said (pp. 16-17) that the bottle would be irrelevant if petitioner had *no* interest in it. This is transmuted (Opp. p. 7) into its converse—a claim that it "could not have been relevant evidence unless it was shown to have been his *exclusive* property".

665.[9] This proposition was acknowledged by the government in its brief in opposition in *Ziemer* v. *United States,* cited at p. 18, n. 13 of the Petition. Only by treating the Petition as having raised a different question could the Government avoid conceding error on this issue.

The only point which the Opposition makes which is even arguably meritorious is that *United States* v. *Mitchell,* 322 U.S. 65 held that a consent to a search given under arrest can be considered voluntary to justify a search without a warrant. (Opp. p. 7) This is a possible reading of the *Mitchell* case but we do not think it is a correct one. The central issue in *Mitchell* was whether the detention of the defendant was lawful under *McNabb* v. *United States,* 318 U.S. 332. The legality of his conviction and of the search were deemed to turn on that issue. The Fourth Amendment was not discussed. Nor did respondent argue that a consent to a search incident to an arrest was necessarily involuntary.[10] Thus the question appears to be open here. In any event some Courts of Appeals have been most reluctant to assume that a consent given under arrest is voluntary. In recognition of the psychological reality of the moral coercion inherent in

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[9] "Standards of this kind must be maintained and enforced by the trial and appellate courts. If they are not, the guarantees of the Bill of Rights can quickly disappear through nullification." *Judd* v. *United States,* 190 F. 2d 649, 652 (CADC).

[10] In *Mitchell* the consent was not to a generalized search, but to the seizure of particular stolen goods whose location was identified by the respondent. Arguably a different test would be applicable for the legality of the recovery of stolen goods. Cf. *Boyd* v. *United States,* 116 U.S. 616, 623; *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, 699-700.

police detention they have placed on the government the burden of establishing voluntariness.[11] Not so the court below. This contrariety of views on a recurring question should be resolved by the promulgation of the general standard by this Court.

CONCLUSION

The Petition for Certiorari does not emphasize the general importance of this case. It was thought enough that petitioner has been sentenced to five years imprisonment on a conviction which rests on the admission of two exhibits which were the products of separate illegal searches. We adhere to the view that certiorari should be granted because the decision below is inconsistent with *Preston* v. *United States, supra,* and *Stoner* v. *California, supra.* But if we are wrong in this, the issues raised by the Petition are of such significance to the administration of criminal justice that they merit this Court's attention.

The Government, while seeking to retain this conviction, does not dispute the importance of these questions; we submit that law enforcement officials would be well served by their resolution. Federal officers apparently conduct as a regular practice warrantless searches of automobiles believed to have been used in carrying narcotics; they should learn whether or not 49 U.S.C. § 782 justifies such action. Likewise they should know when they may rely on a consent to a search. The Government itself has asserted that the latter issue "will affect nation-wide law enforcement." See Pet. p. 17, quoting from the Government's Peti-

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[11] *Ray* v. *United States,* 84 F. 2d 654, 656 (CA5); *Judd* v. *United States,* 190 F. 2d 649, 651 (CA DC); *United States* v. *Arrington,* 215 F. 2d 630, 637 (CA7).

tion for Rehearing after the original decision below. There are many cases in which police officers could obtain a warrant but believe in good faith that none is necessary, thus needlessly risking the validity of the search and a subsequent conviction.

The Petition for Certiorari should be granted.

Respectfully submitted,

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